

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## DEPARTMENT OF AGRICULTURE

### Rural Business-Cooperative Service

#### 7 CFR Parts 1980 and 4279

RIN 0570-AA49

#### Business and Industry Guaranteed Loans—Tangible Balance Sheet Equity

**AGENCY:** Rural Business-Cooperative Service, USDA.

**ACTION:** Proposed rule.

**SUMMARY:** The Rural Business-Cooperative Service (RBS or the Agency) proposes to amend existing regulations relating to Business and Industry (B&I) loans made or guaranteed by the Agency by modifying the provisions that address the evaluation of credit quality. Specifically, the Agency proposes to modify the definition of tangible balance sheet equity to include the off balance sheet value of tangible assets to the extent of the difference between the depreciated book value of real property assets and their current market value supported by an appraisal or the original book value, whichever is less. Adjusted tangible balance sheet equity will also include qualified subordinated debt owed to the owner. This adjusted equity calculation will apply only in cases where the Agency is asked to guarantee a refinancing of outstanding debt. The Agency also proposes to increase the equity requirements applicable to energy businesses. The intended effect of this action is to facilitate Agency guarantees of refinancing loans that otherwise would not meet the equity requirements because the financial statements prepared in accordance with generally accepted accounting principles do not reflect the current market value of real property assets owned by the borrower.

**DATES:** Written or e-mail comments on this proposed rule must be submitted on or before March 16, 2004.

**ADDRESSES:** Submit written comments, in duplicate, via either the U.S. Postal Service or express courier. Comments

sent via the U.S. Postal Service should be addressed to the Branch Chief, Regulations and Paperwork Management Branch, Rural Development, U.S. Department of Agriculture, STOP 0742, 1400 Independence Ave., SW., Washington, DC 20250-0742. Written comments via Federal Express Mail, or via another mail courier service requiring a street address, should be addressed to the same attention at 300 7th Street, SW., 7th Floor, Washington, DC 20024. Also, comments may be submitted via the Internet by addressing them to "comments@rus.usda.gov" and must contain the word "Tangible" in the subject line. All written comments will be available for public inspection during regular work hours at the 300 7th Street, SW., address listed above.

**FOR FURTHER INFORMATION CONTACT:** Fred Kieferle, Rural Business-Cooperative Service, USDA, Stop 3224, Room 6871, 1400 Independence Ave., SW, Washington, DC 20250-3224, Telephone (202) 720-7818, Fax (202) 720-6003, or e-mail: [fred.kieferle@usda.gov](mailto:fred.kieferle@usda.gov).

#### SUPPLEMENTARY INFORMATION:

##### Classification

This proposed rule has been determined to be not significant for purposes of Executive Order (E.O.) 12866 and, therefore, has not been reviewed by the Office of Management and Budget.

##### Programs Affected

The Catalog of Federal Domestic Assistance Program number assigned to the applicable programs is 10.768, Business and Industry Loans.

##### Executive Order 12372

As stated in the Notice related to 7 CFR part 3015, subpart V, the programs and activities within this rule are subject to E.O. 12372 which requires intergovernmental consultation in the manner delineated in 7 CFR part 3015, subpart V. Accordingly, agency personnel advise all prospective applicants of whether their state has elected to participate in the consultation process by designating a single point of contact and name of that contact point.

##### Program Administration

These programs are administered through the Business and Industry

Division of the Rural Business-Cooperative Service within the Rural Development mission area of USDA and delivered via the USDA Rural Development State Directors.

##### Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995, the information collection requirements contained in this regulation have been approved by OMB under control numbers 0570-0014 and 0570-0017. The changes made in this proposed rulemaking to part 4279 are covered under the scope of the paperwork burden on file for these control numbers and already approved by OMB. The revisions in this rulemaking for part 1980 will require an amendment to the burden package and this modification to the burden package will be made when the final rule is promulgated.

##### Environmental Impact Statement

It is the determination of RBS that this action is not a major Federal action significantly affecting the environment. Therefore, in accordance with the National Environmental Policy Act of 1969, an Environmental Impact Statement is not required.

##### Executive Order 12988

This proposed rule has been reviewed in accordance with E.O. 12988, Civil Justice Reform. In accordance with this rule: (1) All state and local laws and regulations that are in conflict with this rule will be preempted; (2) no retroactive effect will be given to this rule; and (3) administrative proceedings in accordance with 7 CFR part 11 must be exhausted before bringing suit in court challenging action taken under this rule unless those regulations specifically allow bringing suit at an earlier time.

##### Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) establishes requirements for Federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. Under section 202 of the UMRA, USDA must prepare a written statement, including a cost benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to state, local or tribal

governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. When such a statement is needed for a rule, section 205 of UMRA generally requires USDA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost effective or least burdensome alternative that achieves the objectives of the rule.

This rule contains no Federal mandates (under the regulatory provisions of title II of the UMRA) for state, local, and tribal governments or the private sector. Therefore this rule is not subject to the requirements of sections 202 and 205 of UMRA.

### Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (5 U.S.C. 601-612), the undersigned has determined and certified by signature of this document that this rule will not have a significant economic impact on a substantial number of small entities. Some provisions published as a part of this rule are, in fact, a benefit to small entities.

The modified equity test in the case of refinancing applies equally to large and small entities, but in practice, the Agency expects it to benefit smaller entities disproportionately more than larger businesses. In the Agency's experience, the largest single component of off balance sheet value in a small firm is the real property it owns. Small firms that are real property rich, but cash flow constrained, may find this change to be the only means for achieve flexibility in refinancing, while larger businesses may have other ways, *i.e.*, other assets to work with, to achieve the same result.

The proposed change in equity requirements for energy loans may make it more difficult for small firms to qualify. The energy business is a capital intensive business and the corresponding risk is greater when it is undertaken by undercapitalized firms. It may be more difficult for small firms to raise the necessary equity for one project, whereas a larger business can spread the risk across more than one project.

On balance, the net effect of this rulemaking is expected to be neutral in its overall impact on smaller firms. Accordingly, a regulatory flexibility analysis was not performed."

### Executive Order 13132, Federalism

The policies contained in this rule do not have any substantial direct effect on states, on the relationship between the national government and the states, or on the distribution of power and

responsibilities among the various levels of government. Nor does this rule impose substantial direct compliance costs on state and local governments. This rule is intended to foster cooperation between the Federal Government and the states and local governments, and reduces, where possible, any regulatory burden imposed by the Federal Government that impedes the ability of states and local governments to solve pressing economic, social and physical problems in their state.

### Background

The current loan processing regulations for B&I Guaranteed Loan Program provide that the lender is primarily responsible for determining credit quality and must address all of the elements of credit quality in a written credit analysis. The Agency assumes this responsibility for the B&I Direct Loan Program. One of the elements of credit quality required in the regulation is that borrowers demonstrate a minimum level of tangible balance sheet equity. The threshold level of required tangible balance sheet equity is higher for new businesses than for existing businesses; separate thresholds for all energy related businesses also apply.

Conventional accounting policies and procedures provide for a distinction between tangible and intangible assets. The net equity on a balance sheet reflects the net book value of all assets, after depreciation, less total liabilities. The current regulations take a conservative approach in evaluating the equity component of a balance sheet, specifying that acceptable equity for credit quality purposes be restricted to tangible balance sheet equity, as defined in the regulation.

Where the accounting terms used in the regulation coincide with terms used in generally accepted accounting principles (GAAP),<sup>1</sup> the GAAP

<sup>1</sup> The meaning of the term generally accepted accounting principles (GAAP) has evolved over time. It used to refer to widely used, but uncodified, accounting policies and procedures. With time, standard-setting bodies and professional organizations came into being and became more involved in recommending preferred practices by means of issued pronouncements. Over the past fifty years, principles were promulgated by different groups, some of which are no longer in existence, and some conflicts exist between the various pronouncements. The American Institute of Certified Public Accountants issued a statement of auditing standards (SAS-69) to better organize and clarify what is meant by GAAP. This statement instructs financial statement preparers, auditors and users of financial statements concerning the relative priority of the different sources of GAAP (past and present pronouncements by the many standard-setting entities) used by auditors to judge the fairness of presentation in financial statements.

definitions are presumed in the regulation. Tangible balance sheet equity is not a term used in GAAP; there is no commonly held definition. It is nevertheless a concept familiar to many financial analysts and regulators who craft customized definitions, tailored to a specific industry or application, using the commonly understood terms found in GAAP as the basic building blocks.<sup>2</sup>

Tangible balance sheet equity is a refinement of the GAAP concept of equity, typically arrived at by reducing balance sheet equity by the book value assigned to intangible assets, including but not limited to assets such as goodwill, going concern value, organizational start up expenses, etc. These items are recognized as capital assets for purposes of GAAP but may or may not be assets that can be readily liquidated or pledged as security for loans.

The modification proposed in this rulemaking acknowledges that the market value of real property assets may increase at the same time the net book value of such assets decreases. The net book value of real property usually decreases over time due to depreciation, whereas the market value of real property may stay the same or appreciate over time.

In a lower interest rate environment, refinancing is a reasonable business strategy. The current regulation, however, does not contemplate that any credit can be given for a positive difference between net book value and market value for purposes of evaluating the equity component of credit worthiness when a borrower seeks Agency-guaranteed refinancing at a lower interest rate. It has happened that borrowers that could have met a modified balance sheet equity test have been foreclosed from this option because the equity ratio calculated using the conventional GAAP values reported on the balance sheet do not meet the equity test in the current regulation at the time the refinancing is of interest to the borrower. When this happens, the borrower is captive to the existing lender that is the beneficiary of the original Agency guarantee on what has become an above market rate loan. This lender has minimal incentive to refinance the above market rate loan, and unless the Agency can guarantee another lender willing to refinance the

<sup>2</sup> See, for example, Cal. Admin. Code title 28, section 1300.76, where the state requires licensed health care service plans to maintain a minimum tangible net equity and another, Federal, example at 12 CFR 208.41 where tangible net equity is incorporated into the capital adequacy requirements required of state chartered banks that are members of the Federal Reserve system.

first lender's exposure, the borrower is locked into the higher interest rate. It is not able to "shop" for a lower interest rate. When the loan in question is already USDA guaranteed, the taxpayer is in a position of guaranteeing the higher interest rate when a lower exposure could otherwise be effected and there is a corresponding increased risk of default under the guarantee. The increased risk of default comes about when these higher interest rates undermine the financial health of the borrowers and lead to what otherwise could be avoidable financial defaults.

This proposed rule is intended to provide the borrower with refinancing flexibility when the market value of the real property on the balance sheet justifies a more flexible approach to the equity requirement than is allowed by the current regulation. The amount of the refinancing loan may not exceed the outstanding balance of the loan to be refinanced. Where a refinancing request is coupled with a "new money" guarantee application, the conventional, unadjusted, tangible balance sheet equity test will be applied to the combined guarantee request.

The Agency has considered, but not elected to propose, revising the tangible balance sheet equity test to apply across the board, for all borrowers, and not restrict its availability to refinancing loan applications. It may be that the Agency's experience with the limited applicability of this rulemaking will lead to proposing its wider application in the future. For now, it was determined to proceed with a more limited applicability in order to bring relief to at least some borrowers in a more rapid period of time.

The Agency has considered, but not elected to allow, full market value refinancing in this proposed rulemaking. The potential for abuse of market appraisals for purposes of full market value refinancing is thought to be greater than the potential benefit of liberalizing the related equity criterion to this maximum degree. In the alternative, the Agency has opted to allow consideration of market value only with respect to the equity test calculation; the amount of the refinancing loan itself may not exceed the outstanding balance of the loan to be refinanced. Market value must be determined by appraisals using arms-length methodologies to arrive at an unbiased "fair or current market value".

Allowing flexibility in the equity requirement for refinancing loans where the market value of real property assets supports such flexibility will serve to enhance the financial health of Agency-

guaranteed borrowers and promote rural development.

In order to provide for an alternate equity calculation in determining whether the credit requirement is met for refinancing loans, the Agency has modified existing regulations to define "tangible balance sheet equity" and added two new definitions that build directly and indirectly on this term—adjusted tangible net worth" and "allowed tangible asset appreciation". The term "subordinated owner debt" is also added. These new terms apply only in the case of refinancing requests.

"Subordinated owner debt" is defined as subordinated debt owed to one or more of the owners of the borrower.

An example that demonstrates the practical effect of this change is as follows. XYZ Company is capitalized with \$200,000 cash on day 1 and uses \$200,000 cash and \$800,000 Agency guaranteed debt to purchase a building for \$1,000,000 on day 2. Assume (1) the building is depreciated at 10 percent a year, (2) the market value of the building at the end of year 2 has appreciated to \$1,200,000, (3) there are no other assets on the balance sheet at the end of year 2 for purposes of this simplified example, (4) the mortgage does not begin to amortize until the end of year 4, and (5) the income statement reflects a cumulative net loss of (\$200,000) for the first two years of operations. At the end of year 2 the company would like to refinance the mortgage debt. At this point in time tangible balance sheet equity is \$ -0-. Per the revised regulation, however, the tangible balance sheet can be adjusted upwards by an increment equal to the difference between the net book value of the property (\$800,000) and the lesser of (1) its original book value (\$1,000,000) or (2) an appraisal supported current market value (\$1,200,000). Thus, the adjusted tangible balance sheet equity in that case would be \$-0 plus \$200,000, or \$200,000 for purposes of determining eligibility for a refinancing loan guarantee. In order to calculate the equity ratio, (equity as a percentage of equity plus total liabilities), the result would be 200,000/1,000,000, or 20 percent.

A second refinement to the GAAP concept of equity proposed in this rulemaking for this credit evaluation criterion is to include in the equity calculation subordinated debt contributed to the borrower by the business owner(s). In order for this subordinated debt to count as equity for purposes of the equity criterion, the subordinated note must be expressly subordinate to the Agency's B&I loan exposure, whether that exposure is

direct or guaranteed. Moreover, the loan documentation must provide that repayment of this subordinated debt may not commence until the earlier of the full repayment of the B&I loan exposure or when a period of three consecutive years has passed during which the borrower has met all loan covenants and evidenced operating profit sufficient to commence partial repayment of this subordinated debt after giving effect to the annual debt service requirements of the B&I loan exposure. The partial repayment schedule in the case of the latter scenario may not be more accelerated than the debt repayment schedule in effect for the Agency's B&I loan exposure.

To carry our earlier example one step further, assume (1) that an owner provides \$100,000 of subordinated debt to XYZ Company in year 3 so that it can purchase a patent. Also assume (2) the market value of the building at the end of year 3 remains at \$1,200,000, (3) there are no other assets on the balance sheet at the end of year 3 for purposes of this simplified example, and (4) the income statement reflects a cumulative net loss of (\$300,000) for the first three years of operations. Instead of refinancing at the end of year two as described above, the Company seeks a refinancing loan guarantee at the end of year three. Total liabilities equal the \$800,000 mortgage debt plus \$100,000 in subordinated family capital. Tangible balance sheet equity as defined in the proposed rule equals total equity less the book value of intangible assets, or (\$100,000) minus \$100,000 = (\$200,000). Per the revised regulation, however, the tangible balance sheet equity can be adjusted upwards by an increment equal to the difference between the net book value of the property (\$700,000) and the lesser of (1) its original book value (\$1,000,000) or (2) an appraisal supported current market value (\$1,200,000). Thus, the adjusted tangible balance sheet equity in that case would be (\$200,000) plus \$300,000, or \$100,000 for purposes of determining eligibility for a refinancing loan guarantee. In order to calculate the equity ratio, (equity as a percentage of equity plus total liabilities), the result would be 100,000/1,000,000, or 10 percent. In practice, the Agency has considered the dividing line between new businesses and existing businesses in similar situations to be three years. Thus, the 10 percent equity requirement for existing businesses would apply and this borrower would qualify for a refinancing loan as a result of this regulatory change. In this example, the income statement shows three years of

consecutive accrual losses, but breakeven cash flows. The reduced equity requirement (from 20 percent to 10 percent) for existing business could have been triggered earlier under existing regulations had XYZ Company demonstrated a one full successful year of operations prior to the end of year three.

This proposed rule also modifies the equity requirement for certain energy projects and provides that financing will be guaranteed for energy projects only when they have met certain performance criteria. Financing for energy projects will only be allowed when the facility has been constructed according to plans and specifications and is producing at the design levels approved by the Agency for purposes of underwriting the loan or loan guarantee. The higher equity requirements reflect the Agency's determination that energy projects are riskier than the average B&I portfolio loan. The Agency's energy borrowers are typically not utilities in the conventional sense. As a general rule, conventional utilities have other sources of financing and higher capital requirements than can practicably be met by RBS programs.

The proposed rule contemplates that energy projects must demonstrate two complete operating cycles at design performance levels submitted to and accepted by the Agency. A complete operating cycle consists of the purchase of raw material inputs, their input into the manufacturing process and transformation into a design specified number of output units for a given level of raw material input within a specified period of time and at a design-specified quality level. In the case of projects that produce steam or electricity as an output, there is an additional requirement that they be successfully interconnected with the purchaser of the output. This is not the same as being connected to the power grid alone. Being connected to the grid, without enforceable wheeling agreements and physical interconnection with the buyer at the other end of the transmission route, does not satisfy this requirement. Successful interconnection with the purchaser of the steam or electricity means that everything is in place that is required for the purchaser to receive the steam or electricity output in accordance with the contractual terms specified and such delivery has been demonstrated.

#### List of Subjects in 7 CFR Parts 1980 and 4279

Loan programs—Business and industry—Rural development assistance, Rural areas.

Accordingly, Chapters XVIII and XLII, title 7, of the Code of Federal Regulations are proposed to be amended as follows:

#### CHAPTER XVIII—RURAL HOUSING SERVICE, RURAL BUSINESS-COOPERATIVE SERVICE, RURAL UTILITIES SERVICE, AND FARM SERVICE AGENCY, DEPARTMENT OF AGRICULTURE

##### PART 1980—GENERAL

1. The authority citation for part 1980 is revised to read as follows:

**Authority:** 5 U.S.C. 301 and 7 U.S.C. 1989. Subpart E also issued under 7 U.S.C 1932(a).

##### Subpart E—Business and Industrial Loan Program

2. Section 1980.402 is revised to read as follows:

##### § 1980.402 Definitions.

###### (a) Definitions.

The following general definitions are applicable to the terms used in this subpart. Additional definitions may be found in § 1980.6 of subpart A of this part.

*Adjusted tangible net worth.* Tangible balance sheet equity plus allowed tangible asset appreciation and subordinated owner debt.

*Allowed tangible asset appreciation.* Allowed tangible asset appreciation means the difference between the current net book value recorded on the financial statements (original cost less cumulative depreciation) of real property assets and the lesser of their current market value or original cost, where current market value is determined using an appraisal satisfactory to the Agency.

*Area of high unemployment.* An area in which a B&I Loan Guarantee can be issued, consisting of a county or group of contiguous counties or equivalent subdivisions of a State which, on the basis of the most recent 12-month average or the most recent annual average data, has a rate of unemployment 150 percent or more of the national rate. Data used must be those published by the Bureau of Labor Statistics, U.S. Department of Labor.

*Biogas.* Biomass converted to gaseous fuel.

*Biomass.* Any organic material that is available on a renewable or recurring basis including agricultural crops, trees grown for energy production, wood waste and wood residues, plants, including aquatic plants and grasses, fibers, animal waste and other waste materials, fats, oils, greases, including recycled fats, oils and greases. It does not include paper that is commonly recycled or unsegregated solid waste.

*Borrower.* A borrower may be a cooperative, corporation, partnership, trust or other legal entity organized and operated on a profit or nonprofit basis; an Indian Tribe on a Federal or State reservation or other Federally recognized tribal group; a municipality, county or other political subdivision of a State; or an individual. Such borrower must be engaged in or proposing to engage in improving, developing or financing business, industry and employment and improving the economic and environmental climate in rural areas, including pollution abatement and control.

*Business and Industry Disaster Loans.* Business and Industry loans guaranteed under the authority of the Direct Emergency Supplemental Appropriations Act, 1992, Public Law 102-368. These guaranteed loans cover costs arising from the direct consequences of natural disasters such as Hurricanes Andrew and Iniki and Typhoon Omar that occur after August 23, 1992, and receive a Presidential declaration. Also included are the costs to any producer of crops and livestock that are a direct consequence of at least a 40 percent loss to a crop, 25 percent loss to livestock or damage to building structures from a microburst wind occurrence in calendar year 1992.

*Community facilities.* For the purpose of this subpart, community facilities are those facilities designed to aid in the development of private business and industry in rural areas. Such facilities include, but are not limited to, acquisition and site preparation of land for industrial sites (but not for improvements erected thereon), access streets and roads serving the site, parking areas extension or improvement of community transportation systems serving the site and utility extensions all incidental to site preparation. Projects eligible for assistance under Subpart A of Part 1942 of this chapter are not eligible for assistance under this subpart.

*Development cost.* These costs include, but are not limited to, those for acquisition, planning, construction, repair or enlargement of the proposed facility; purchase of buildings, machinery, equipment, land easements, rights of way; payment of startup operating costs, and interest during the period before the first principal payment becomes due, including interest on interim financing.

*Disaster Assistance for Rural Business Enterprises.* Guaranteed loans authorized by section 401 of the Disaster Assistance Act of 1989 (Pub. L. 101-82), providing for the guarantee of loans to assist in alleviating distress caused to

rural business entities, directly or indirectly, by drought, freeze, storm, excessive moisture, earthquake, or related conditions occurring in 1988 or 1989, and providing for the guarantee of loans to such rural business entities that refinance or restructure debt as a result of losses incurred, directly or indirectly, because of such natural disasters. See this subpart and its appendices, especially appendix K, containing additional regulations for these loans.

**Drought and Disaster guaranteed loans.** Guaranteed loans authorized by section 331 of the Disaster Assistance Act of 1988 (Pub. L. 100-387), providing for the guarantee of loans to assist in alleviating distress caused to rural business entities, directly or indirectly, by drought, hail, excessive moisture, or related conditions occurring in 1988, or providing for the guarantee of loans to such rural business entities that refinance or restructure debt as a result of losses incurred, directly or indirectly, because of such natural disasters.

**Energy projects.** Projects that produce or distribute energy and projects that produce biomass or biogas fuel, where such projects utilize technology that has a proven operating history, and for which there is an established industry for the design, installation, and service (including spare parts) of the equipment.

**Hurricane Andrew.** A hurricane that caused damage in southern Florida on August 24, 1992, and in Louisiana on August 26, 1992.

**Hurricane Iniki.** A hurricane that caused damage in Hawaii on September 11, 1992.

**Letter of conditions.** Letter issued by FmHA or its successor agency under Public Law 103-354 to a borrower setting forth the conditions under which FmHA or its successor agency under Public Law 103-354 will make a direct (insured) loan from the Rural Development Insurance Fund.

**Loan classification system.** The process by which loans are examined and categorized by degree of potential for loss in the event of default.

**Microburst wind.** A violently descending column of air associated with a thunderstorm which causes straight line wind damage.

**Problem loan.** A loan which is not performing according to its original terms and conditions or which is not expected in the future to perform according to those terms and conditions.

**Public body.** A municipality, political subdivision, public authority, district, or similar organization.

**Refinancing loan.** A loan, all of the proceeds of which are applied to

extinguish the entire balance of an outstanding debt.

**Seasoned loan.** A loan which:

(1) Has a remaining principal guaranteed loan balance of two-thirds or less of the original aggregate of all existing B&I guaranteed loans made to that business.

(2) Is in compliance with all loan conditions and B&I regulations.

(3) Has been current on the B&I guaranteed loan(s) payments for 24 consecutive months.

(4) Is secured by collateral which is determined to be adequate to insure there will be no loss on the B&I guaranteed loan.

**State.** Any of the fifty States, the Commonwealth of Puerto Rico, the Virgin Islands of the United States, Guam, American Samoa and the Commonwealth of the Northern Mariana Islands.

**Subordinated owner debt.** Debt owed by the borrower firm to the owner(s) that is subordinated to debt owed by the borrower to the Agency or guaranteed by the Agency (aggregate B&I Loan Exposure) pursuant to a subordination agreement satisfactory to the Agency. The debt must have been issued in exchange for cash loaned to the borrower. The terms of the subordination agreement must provide that repayment will not commence until the earlier of the date all indebtedness owed to or guaranteed by the Agency has been repaid or when a period of three consecutive years has passed during which the borrower has met all loan covenants and evidenced operating profit sufficient to commence partial repayment of this subordinated debt after giving effect to the annual debt service requirements of the aggregate B&I Loan Exposure. The partial repayment schedule in the case of the latter scenario is subject to annual Agency concurrence and may not be more accelerated than the debt repayment schedule in effect for the Agency's aggregate B&I Loan Exposure.

**Tangible balance sheet equity.** Total equity less the value of intangible assets recorded on the financial statements, as determined from balance sheets prepared in accordance with generally accepted accounting principles (GAAP).

**Typhoon Omar.** A typhoon that caused damage in Guam on August 28, 1992.

**Working capital.** The excess of current assets over current liabilities. It identifies the relatively liquid portion of total enterprise capital which constitutes a margin or buffer for meeting obligations within the ordinary operating cycle of the business.

(b) Accounting terms not otherwise defined in this part shall have the definition ascribed to them under generally accepted accounting principles (GAAP).

3. Section 1980.411 is amended by revising paragraph (a)(11)(iii), by adding new paragraphs (a)(11)(iv) and (a)(11)(v) and by adding a new paragraph (a)(16) to read as follows:

**§ 1980.411 Loan purposes.**

\* \* \* \* \*

(a) \* \* \*

(11) \* \* \*

(iii) It is necessary to place a permanent loan subsequent to an interim loan for financing the construction of the project;

(iv) It does not refinance subordinated owner debt; and

(v) The refinancing loan guaranteed by the Agency does not exceed the balance outstanding of the debt to be refinanced.

\* \* \* \* \*

(16) **Energy projects.** Energy projects that produce biomass fuel, biogas, fuel cells or batteries as an output must have completed two operating cycles at design performance levels submitted to and accepted by the Agency. Projects that produce steam or electricity as an output must have met or exceeded acceptance test performance criteria submitted to and approved by the Agency and be successfully interconnected with the purchaser of the output. Performance or acceptance test requirements for all other energy projects may be determined by the Agency on a case by case basis. Financing for energy projects will only be allowed when the facility has been constructed according to plans and specifications and is producing at the quality and quantity projected in the application.

\* \* \* \* \*

4. Section 1980.441 is revised to read as follows:

**§ 1980.441 Borrower equity requirements.**

(a) A minimum of 10 percent tangible balance sheet equity will be required for existing businesses at the loan and guarantee closing (40 percent for energy related businesses). A minimum of 20 percent tangible balance sheet equity will be required for new businesses at the loan or guarantee closing (50 percent for all new energy related businesses). Where the application is a request for only a refinancing loan guarantee, without any related incremental new financing, the equity requirement may be determined using adjusted tangible net worth. An application that combines a refinancing guarantee request with a

new loan guarantee request is subject to the standard, unadjusted, equity requirement except as provided in paragraphs (a)(1) or (a)(2) of this section. Increases or decreases in the equity requirements may be imposed or granted as follows:

(1) A reduction in the equity requirement for existing businesses may be permitted by the Administrator. In order for a reduction to be considered, the borrower must furnish the following:

(i) Collateralized personal and corporate guarantees, including any parent, subsidiary, or affiliated company, when feasible and legally permissible, and

(ii) Pro forma and historical financial statements that indicate the business to be financed meets or exceeds the median quartile (as identified in the Risk Management Association's Annual Statement Studies or similar publication) for the current ratio, quick ratio, debt-to-worth ratio, debt coverage ratio, and working capital.

(2) The approval official may require more than the minimum equity requirements provided in this paragraph if the official makes a written determination that special circumstances necessitate this course of action.

(b) The equity requirement must be met in the form of either cash or tangible earning assets contributed to the business and reflected on the balance sheet.

(c) The equity requirement must be determined using balance sheets prepared in accordance with GAAP and met upon giving effect to the entirety of the loan in the calculation, whether or not the loan itself is fully advanced, as of the date the guaranteed loan is closed.

**CHAPTER XLII—RURAL BUSINESS-COOPERATIVE SERVICE AND RURAL UTILITIES SERVICE, DEPARTMENT OF AGRICULTURE**

**PART 4279—GUARANTEED LOANMAKING**

5. The authority citation for part 4279 is revised to read as follows:

**Authority:** 5 U.S.C. 301, 7 U.S.C. 1989 and 7 U.S.C. 1932(a).

**Subpart A—General**

6. Section 4279.2 is revised to read as follows:

**§ 4279.2 Definitions and abbreviations.**

(a) *Definitions.*

*Adjusted tangible net worth.* Tangible balance sheet equity plus allowed

tangible asset appreciation and subordinated owner debt.

*Agency.* The Rural Business-Cooperative Service or successor Agency assigned by the Secretary of Agriculture to administer the B&I program. References to the National Office, Finance Office, State Office or other Agency offices or officials should be read as prefaced by Agency or "Rural Development" as applicable.

*Allowed tangible asset appreciation.* The difference between the current net book value recorded on the financial statements (original cost less cumulative depreciation) of real property assets and the lesser of their current market value or original cost, where current market value is determined using an appraisal satisfactory to the Agency.

*Arm's-length transaction.* The sale, release, or disposition of assets in which the title to the property passes to a ready, willing and able disinterested third party that is not affiliated with or related to and has no security, monetary or stockholder interest in the borrower or transferor at the time of the transaction.

*Assignment Guarantee Agreement (Business and Industry).* Form 4279-6, the signed agreement among the Agency, the lender and the holder containing the terms and conditions of an assignment of a guaranteed portion of a loan, using the single note system.

*Biogas.* Biomass converted to gaseous fuel.

*Biomass.* Any organic material that is available on a renewable or recurring basis including agricultural crops, trees grown for energy production, wood waste and wood residues, plants, including aquatic plants and grasses, fibers, animal waste and other waste materials, fats, oils, greases, including recycled fats, oils and greases. It does not include paper that is commonly recycled or unsegregated solid waste.

*Borrower.* All parties liable for the loan except for guarantors.

*Conditional Commitment (Business and Industry).* Form 4279-3, the Agency's notice to the lender that the loan guarantee it has requested is approved subject to the completion of all conditions and requirements set forth by the Agency.

*Deficiency balance.* The balance remaining on a loan after all collateral has been liquidated.

*Deficiency judgment.* A monetary judgment rendered by a court of competent jurisdiction after foreclosure and liquidation of all collateral securing the loan.

*Energy projects.* Projects that produce or distribute energy and projects that produce biomass or biogas fuel, where

such projects utilize technology that has a proven operating history, and for which there is an established industry for the design, installation, and service (including spare parts) of the equipment.

*Existing lender debt.* A debt not guaranteed by the Agency, but owed by a borrower to the same lender that is applying for or has received the Agency guarantee.

*Fair market value.* The price that could reasonably be expected for an asset in an arm's-length transaction between a willing buyer and a willing seller under ordinary economic and business conditions.

*Farmers Home Administration (FmHA).* The former agency of USDA that previously administered the programs of this Agency. Many instructions and forms of FmHA are still applicable to Agency programs.

*Finance office.* The office which maintains the Agency financial accounting records located in St. Louis, Missouri.

*High-impact business.* A business that offers specialized products and services that permit high prices for the products produced, may have a strong presence in international market sales, may provide a market for existing local business products and services, and which is locally owned and managed.

*Holder.* A person or entity, other than the lender, who owns all or part of the guaranteed portion of the loan with no servicing responsibilities. When the single note option is used and the lender assigns a part of the guaranteed note to an assignee, the assignee becomes a holder only when the Agency receives notice and the transaction is completed through the use of Form 4279-6 or predecessor form.

*Interim financing.* A temporary or short-term loan made with the clear intent that it will be repaid through another loan. Interim financing is frequently used to pay construction and other costs associated with a planned project, with permanent financing to be obtained after project completion.

*Lender.* The organization making, servicing and collecting the loan which is guaranteed under the provision of the appropriate subpart.

*Lender's Agreement (Business and Industry).* Form 4279-4 or predecessor form between the Agency and the lender setting forth the lender's loan responsibilities when the Loan Note Guarantee is issued.

*Loan agreement.* The agreement between the borrower and lender containing the terms and conditions of the loan and the responsibilities of the borrower and lender.

*Loan Note Guarantee (Business and Industry).* Form 4279-5 or predecessor form issued and executed by the Agency containing the terms and conditions of the guarantee.

*Loan-to-value.* The ratio of the dollar amount of a loan to the dollar value of the collateral pledged as security for the loan.

*Natural resource value-added product.* Any naturally occurring product that is processed to add value to the product. For example, straw is processed into particle board.

*Negligent servicing.* The failure to perform those services which a reasonably prudent lender would perform in servicing (including liquidation of) its own portfolio of loans that are not guaranteed. The term includes not only the concept of a failure to act, but also not acting in a timely manner, or acting in a manner contrary to the manner in which a reasonably prudent lender would act.

*Parity.* A lien position whereby two or more lenders share a security interest of equal priority in collateral. In the event of default, each lender will be affected on a *pro rata* basis.

*Participation.* Sale of an interest in a loan by the lender wherein the lender retains the note, collateral securing the note, and all responsibility for loan servicing and liquidation.

*Poor.* A community or area is considered poor if, based on the most recent decennial census data, either the county, city, or census tract where the community or area is located has a median household income at or below the poverty line for a family of four; has a median household income below the non-metropolitan median household income for the State; or has a population of which 25 percent or more have income at or below the poverty line.

*Promissory note.* Evidence of debt. "Note" or "Promissory note" shall also be construed to include "Bond" or other evidence of debt where appropriate.

*Refinancing loan.* A loan, all of the proceeds of which are applied to extinguish the entire balance of an outstanding debt.

*Rural Development.* The Under Secretary for Rural Development has policy and operational oversight responsibilities for RHS, RBS and RUS.

*Spreadsheet.* A table containing data from a series of financial statements of a business over a period of time. Financial statement analysis normally contains spreadsheets for balance sheet items and income statements and may include funds flow statement data and commonly used ratios. The spreadsheets enable a reviewer to easily scan the

data, spot trends and make comparisons.

*State.* Any of the 50 States, the Commonwealth of Puerto Rico, the Virgin Islands of the United States, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, the Republic of Palau, the Federated States of Micronesia and the Republic of the Marshall Islands.

*Subordinated owner debt.* Debt owed by the borrower firm to the owner(s) that is subordinated to debt owed by the borrower to the Agency or guaranteed by the Agency (aggregate B&I Loan Exposure) pursuant to a subordination agreement satisfactory to the Agency. The debt must have been issued in exchange for cash loaned to the borrower. The terms of the subordination agreement must provide that repayment will not commence until the earlier of the date all indebtedness owed to or guaranteed by the Agency has been repaid or when a period of three consecutive years has passed during which the borrower has met all loan covenants and evidenced operating profit sufficient to commence partial repayment of this subordinated debt after giving effect to the annual debt service requirements of the aggregate B&I Loan Exposure. The partial repayment schedule in the case of the latter scenario is subject to annual Agency concurrence and may not be more accelerated than the debt repayment schedule in effect for the Agency's aggregate B&I Loan Exposure.

*Subordination.* An agreement between the lender and borrower whereby lien priorities on certain assets pledged to secure payment of the guaranteed loan will be reduced to a position junior to or on parity with, the lien position of another loan in order for the Agency borrower to obtain additional financing, not guaranteed by the Agency, from the lender or a third party.

*Tangible balance sheet equity.* Total equity less the value of intangible assets recorded on the financial statements, as determined from balance sheets prepared in accordance with generally accepted accounting principles (GAAP).

*Veteran.* For the purposes of assigning priority points, a veteran is a person who is a veteran of any war, as defined in section 101(12) of title 38, United States Code.

(b) *Abbreviations.*

B&I—Business and Industry  
CF—Community Facilities  
CLP—Certified Lenders Program  
FSA—Farm Service Agency  
FMI—Forms Manual Insert  
NAD—National Appeals Division

OGC—Office of the General Counsel  
RBS—Rural Business-Cooperative Service

RHS—Rural Housing Service  
RUS—Rural Utilities Service  
SBA—Small Business Administration  
USDA—United States Department of Agriculture

(c) Accounting terms not otherwise defined in this part shall have the definition ascribed to them under GAAP.

**Subpart B—Business and Industry Loans**

7. Section 4279.113 is amended by revising paragraph (q) and by adding a paragraph (bb) to read as follows:

**§ 4279.113 Eligible loan purposes.**

\* \* \* \* \*

(q) To refinance outstanding debt when it is determined that the project is viable and refinancing is necessary to improve cash flow and create new or save existing jobs. Existing lender debt may be eligible provided that, at the time of the application, the loan has been current for at least the past 12 months (unless such status is achieved by the lender forgiving the borrower's debt) and the borrower will receive better rates or terms. Subordinated owner debt is not eligible under this paragraph. A refinancing loan guaranteed by the Agency may not exceed the balance outstanding of the debt to be refinanced.

\* \* \* \* \*

(bb) To finance energy projects. Energy projects that produce biomass fuel, biogas, fuel cells or batteries as an output must have completed two operating cycles at design performance levels submitted to and accepted by the Agency. Projects that produce steam or electricity as an output must have met or exceeded acceptance test performance criteria submitted to and approved by the Agency and be successfully interconnected with the purchaser of the output. Performance or acceptance test requirements for all other energy projects may be determined by the Agency on a case by case basis. Financing for energy projects will only be allowed when the facility has been constructed according to plans and specifications and is producing at the quality and quantity projected in the application.

8. Section 4279.131 is amended by revising paragraph (d) to read as follows:

**§ 4279.131 Credit quality.**

\* \* \* \* \*

(d) *Equity.* (1) A minimum of 10 percent tangible balance sheet equity

will be required for existing businesses at the loan and guarantee closing (40 percent for energy related businesses). A minimum of 20 percent tangible balance sheet equity will be required for new businesses at the loan or guarantee closing (50 percent for all new energy related businesses). Where the application is a request for only a refinancing loan guarantee, without any related incremental new financing, the equity requirement may be determined using adjusted tangible net worth. An application that combines a refinancing guarantee request with a new loan guarantee request is subject to the standard, unadjusted, equity requirement except as provided in paragraphs (d)(1)(i) or (d)(1)(ii) of this section. Increases or decreases in the equity requirements may be imposed or granted as follows:

(i) A reduction in the equity requirement for existing businesses may be permitted by the Administrator. In order for a reduction to be considered, the borrower must furnish the following:

(A) Collateralized personal and corporate guarantees, including any parent, subsidiary, or affiliated company, when feasible and legally permissible, and

(B) Pro forma and historical financial statements that indicate the business to be financed meets or exceeds the median quartile (as identified in the Risk Management Association's Annual Statement Studies or similar publication) for the current ratio, quick ratio, debt-to-worth ratio, debt coverage ratio, and working capital.

(ii) The approval official may require more than the minimum equity requirements provided in this paragraph if the official makes a written determination that special circumstances necessitate this course of action.

(2) The equity requirement must be met in the form of either cash or tangible earning assets contributed to the business and reflected on the balance sheet.

(3) The Lender must certify that the equity requirement was determined using balance sheets prepared in accordance with GAAP and met upon giving effect to the entirety of the loan in the calculation, whether or not the loan itself is fully advanced, as of the date the guaranteed loan is closed.

\* \* \* \* \*

Dated: January 12, 2004.

**John Rosso,**

*Administrator, Rural Business-Cooperative Service.*

[FR Doc. 04-979 Filed 1-15-04; 8:45 am]

**BILLING CODE 3410-XY-P**

## **NUCLEAR REGULATORY COMMISSION**

### **10 CFR Part 72**

**RIN 3150-AH25**

#### **List of Approved Spent Fuel Storage Casks: NAC-UMS Revision**

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Proposed rule.

**SUMMARY:** The Nuclear Regulatory Commission (NRC) is proposing to amend its regulations revising the NAC International, Inc., NAC-UMS cask system listing within the "List of Approved Spent Fuel Storage Casks" to include Amendment No. 3 to the Certificate of Compliance (CoC) Number 1015. Amendment No. 3 modifies the present cask system design to add an alternate poison material, revise the structural analysis, revise the thermal analyses, revise fuel assembly weight and dimensions, and revise allowable fuel cladding temperature. The amendment also revises the criticality analyses and reorganizes the Safety Analysis Report Criticality (SAR) Section, revises Technical Specification A.5.5 to remove the effluent reporting requirements, and makes several editorial and administrative changes.

**DATES:** Comments on the proposed rule must be received on or before February 17, 2004.

**ADDRESSES:** You may submit comments by any one of the following methods. Please include the following number—RIN 3150-AH25—in the subject line of your comments. Comments on rulemakings submitted in writing or in electronic form will be made available to the public in their entirety on the NRC rulemaking Web site. Personal information will not be removed from your comments.

Mail comments to: Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, ATTN: Rulemakings and Adjudications Staff.

E-mail comments to [SECY@nrc.gov](mailto:SECY@nrc.gov). If you do not receive a reply e-mail confirming that we have received your comments, contact us directly at (301) 415-1966. You may also submit comments via the NRC's rulemaking Web site at <http://ruleform.llnl.gov>.

Address questions about our rulemaking Web site to Carol Gallagher (301) 415-5905; e-mail [cag@nrc.gov](mailto:cag@nrc.gov). Comments can also be submitted via the Federal eRulemaking Portal <http://www.regulations.gov>.

Hand deliver comments to: 11555 Rockville Pike, Rockville, Maryland 20852, between 7:30 a.m. and 4:15 p.m. on Federal workdays (telephone (301) 415-1101).

Fax comments to: Secretary, U.S. Nuclear Regulatory Commission at (301) 415-1101.

Publicly available documents related to this rulemaking may be viewed electronically on the public computers located at the NRC's Public Document Room (PDR), 0-1F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland. The PDR reproduction contractor will copy documents for a fee. Selected documents, including comments, may be viewed and downloaded electronically via the NRC rulemaking Web site at <http://ruleforum.llnl.gov>.

Publicly available documents created or received at the NRC after November 1, 1999, are available electronically at the NRC's Electronic Reading Room at <http://www.nrc.gov/reading-rm/adams.html>. From this site, the public can gain entry into the NRC's Agencywide Documents Access and Management System (ADAMS), which provides text and image files of NRC's public documents. An electronic copy of the proposed CoC, proposed TS, and preliminary SER can be found under ADAMS Accession Nos. ML032890297 (CoC), ML032890300 and ML032890305 (TS), and ML032890312 (SER). If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC PDR Reference staff at 1-800-397-4209, 301-415-4737 or by e-mail to <http://www.pdr.gov>.

**FOR FURTHER INFORMATION CONTACT:** Jayne M. McCausland, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, telephone (301) 415-6219, e-mail [jmm2@nrc.gov](mailto:jmm2@nrc.gov).

**SUPPLEMENTARY INFORMATION:** For additional information, see the direct final rule published in the Rules and Regulations section of this **Federal Register**.

#### **Procedural Background**

This rule is limited to the changes contained in Amendment 3 to CoC No. 1015 and does not include other aspects of the NAC-UMS cask system design. The NRC is using the "direct final rule procedure" to issue this amendment